IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
September 7, 2001 Session

DON SHAFER, ET AL. v. CITY OF DICKSON, BOARD OF ZONING APPEALS, ET AL.

Appeal from the Chancery Court for Dickson County
No. 6862-00 Leonard W. Martin, Chancellor

No. M2000-03175-COA-R3-CV - Filed August 2, 2002

Petitioners sought common-law writ of certiorari in suit against Board of Zoning Appeals, owner of property, and contractor, after the Board granted a request for a setback variance to allow construction of a proposed convenience store in Dickson, Tennessee, and the Board declined to reconsider its decision. The trial court granted the Respondents' Motion to Dismiss for lack of subject matter jurisdiction because the petition was filed outside the mandatory, jurisdictional time requirement set forth in Tenn. Code Ann. § 27-9-102. We affirm the decision of the trial court because the petition was not filed within the time limitation set forth in the statute and no basis was shown for tolling the limitation period.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed and Remanded

PATRICIA J. COTTRELL, J., delivered the opinion of the court, in which WILLIAM B. CAIN, J., and FRANK G. CLEMENT, JR., SP. J., joined.

Tony L. Turnbow, Franklin, Tennessee, for the appellants, Don Shafer and Mary Shafer.

Dudley M. West, Nashville, Tennessee, for the appellees, Welton Investments and Premier Construction Company, LLC.

Jerry V. Smith, Dickson, Tennessee, for the appellee, City of Dickson, Board of Zoning Appeals.

OPINION

This case involves an attempt by landowners, Don and Mary Shafer ("Shafers") to seek review of a decision of the City of Dickson Board of Zoning Appeals ("Board") granting a setback variance for construction of a convenience market in Dickson, Tennessee on a parcel of property adjoining the Shafers' land.

I. Facts

The parties filed joint stipulations of fact prior to the hearing. From those stipulations, we know the following. The Shafers own a commercial lot at 715 Highway 70 in the City of Dickson, Tennessee. Welton Investments ("Welton") owns two tracts that front Highway 70 and adjoin the Shafers' lot. Welton's lot immediately adjacent to the Shafers' lot is undeveloped and the far lot at the intersection of Highway 70 and Hummingbird Lane houses a convenience market and gas station commonly referred to as the Par Mart. The lots in question and other adjoining lots fronting Highway 70 are subject to a fifty (50) foot setback line pursuant to the ordinances of the City of Dickson. All of the property in question has similar topography in that there is a steep slope at the rear of each of the lots.

On May 1, 2000, Premier Construction Company, LLC ("Premier") applied to the Board on behalf of Welton for a variance of ten (10) feet in front setback and eight (8) feet ten (10) inches in rear setback for the Par Mart property. The application on its face required that all building plans, plats, drawings and other data accompany the application for the variance. The application submitted by Premier was accompanied by an attached site plan describing the combined Welton lots and the proposed expansion of the Par Mart market. The application cited hardships created by the narrow width of the property on the west side and the steep slope on the north side of the property as reasons for seeking the variance. Premier sought the variance so that the structure as proposed and shown on the site plan could be constructed. The site plan depicted the property owned by Welton, including the portion of the property adjoining the Shafers' property and depicted the proposed structure which was designed to span the entire property. The site plan was available for public inspection upon its submission at the City of Dickson Codes Department.

A notice of the hearing on the variance appeared in the local newspaper and set the hearing date as May 16, 2000.[1] The City also placed a sign containing notice of the hearing on the variance on the Par Mart property at least ten days prior to the meeting of the Board. The sign remained on the property continuously until the Board's meeting.[2] The sign provided as follows:

> This property is being considered for a variance from the City of Dickson's adopted regulations. A hearing will be held before the Board of Zoning Appeals at the War Memorial building at [designated time] p.m. on May 16, 2000. For more info. contact the Codes Department at (615) 441-9505.

---

[1]The newspaper notice is not in the record before us. In their sworn complaint, the Shafers alleged that, "The Defendant City posted a notice of a hearing on the variance set for May 16, 2000 in the local newspaper."

[2]There is no ordinance in place which requires the City to place such a sign on property owned by a person seeking a variance and no procedure or practice in Dickson that requires applicants for variances to provide actual notice of a proposed variance to adjoining landowners.

The Shafers saw the sign on the Par Mart property prior to the hearing but failed to appear at the hearing to contest the grant of the variance. The Board approved the setback variance on May 16, 2000. The minutes of that meeting reflect that the representative of Premier

> explained that they propose putting the new market on the adjacent vacant lot with the canopy remaining on the existing site. [He] also explained that given the size of the market and the large slope on the rear of these lots this would be the most suitable location for the proposed market. [He] explained that the proposed canopy would also require a 10 foot front setback variance and that the canopy should not interfere with visibility given the height being 14 feet overall.

The minutes of the May 16, 2000, meeting were approved at the June 20, 2000, Board meeting. After the minutes were recorded, no further action was taken by the City to memorialize the Board's decision approving the variance on May 16, 2000. The stipulated testimony of Rydell Wesson, the Director of Planning and Zoning for the City of Dickson, was that the Codes Department considers any variance approved by the vote of the Board to be effective immediately following the vote. No formal recording of a variance takes place, other than filing of the minutes of the Board's meetings after their approval.

Mr. Wesson requested that plans regarding storm water detention be submitted for the Par Mart property shortly after the variance was granted. Premier prepared detailed plans and bought pipe and other materials for a drainage system in response to Wesson's request.

Welton began construction on the proposed convenience market in mid-September of 2000. Several days later, Don Shafer appeared before the Board and requested that the Board hear his objection and reconsider the grant of the variance to Welton. At the Board meeting on September 19, 2000, Mr. Shafer said the variance affected his business property and he was not given the opportunity to object to it. Although he had seen the sign notifying the public of the variance request and the date of the hearing, he stated that the sign was placed on the lot where the existing store was located, not on the adjacent vacant lot. He stated that his problem with the grant of a variance for hardship purposes was one of "equal protection" because anyone who bought property in that area should be aware they had to work with what they had. He also pointed out that errors existed in the site plan or survey submitted by Premier in support of their application. He further stated "my main objection is by that building being 10 feet further out toward the highway it obstructs clear vision from the intersection to the corner of my building." He asked the Board to reconsider and rescind the variance.

A representative of Premier stated he had been made aware of the errors in the site plan the day before and had taken steps to correct those errors by having someone re-survey the property. The error, however, would not have affected the request for variance, he stated, because it is the existing slope, and their desire not to disturb it, that was the reason for the request. Mr. Wesson stated to the Board that it had granted the variance based upon the shape of the slope which had not changed. With regard to notice, Mr. Wesson stated that the newspaper posts the Board's meeting

dates, and that the Board also posts such notices at city hall. He also stated that his department places a sign on property involved in a variance request as a courtesy, that the lots in question are one tract of land, and that the sign was placed on the part of the property with the biggest change proposed. Mr. Wesson later further explained:

> I need to keep the facts straight as a representative before this Board. Mr. Turnbo stated that the sign was placed on the wrong piece of property. Once again, it is one piece of property not two, the sign was placed on that piece of property so I don't want you to think you have two pieces of property with a sign on one and not on the other.

When asked if there were any further discussion, one Board member noted that the sign is not required, it is done as a courtesy, and stated that the Board should stand on the variance it had granted. Upon motion to that effect, the Board voted to "let the variance stand."

The Shafers sought and obtained a temporary restraining order restraining the parties from proceeding with construction of the convenience market within the front setback area. On September 21, 2000, the Shafers filed a sworn complaint against the Board, Welton, and Premier for a Writ of Mandamus and injunctive relief. An amended complaint was filed on September 22, 2000, and a second amended complaint and petition for writ of certiorari was filed on October 10, 2000. Each of the Shafers' pleadings sought review and recission of the actions taken by the Board in approving the variance on May 16, 2000.[3] On appeal, there is no dispute that the Shafers' action was brought as a petition for writ of certiorari.

The Board, Welton, and Premier filed a motion to dismiss. The trial court considered the motion and determined that the petition for writ of certiorari was filed outside the mandatory, jurisdictional sixty (60) day time limit established in Tenn. Code Ann. § 27-9-102 and that there was no basis for tolling the statute of limitations. The court further found, "to the extent Plaintiffs' pleadings assert additional claims of denial of due process and equal protection under the state and federal constitutions, the court concludes that the record before the court does not support such claims and, in any event, such allegations fail to state a claim upon which relief can be granted against Defendants Welton and Premier."[4]

---

[3]The petition filed by the Shafers alleged that the decision of the Board was arbitrary and capricious and that, based upon the information presented to the City, the Board had no basis for issuing the variance because the decision was made notwithstanding: (1) an inaccurate survey of the lot; (2) failure by Premier to show that the slope of the lot created a hardship that would be remedied by the grant of the variance; and (3) failure by Premier to show the alleged hardships were not self-imposed by the design of the proposed structure. The Shafers alleged that the actions of the Board violated their rights to due process and equal protection.

[4]In the appeal before us, the Shafers do not assert any due process or equal protection claims unrelated to the relief they seek through the writ of certiorari.

In a thorough and well-reasoned Order and Memorandum Opinion, the trial court concluded that it lacked subject matter jurisdiction to issue the common-law writ of certiorari because the action was not filed within sixty (60) days of the Board's grant of the variance on May 16, 2000. The court observed that the Shafers repeatedly admitted that the Board approved the variance on May 16, 2000, and that the Board declined to reconsider its prior decision on September 19, 2000, when the Shafers appeared before the Board and requested reconsideration of the decision. In addition, the trial court found:

> The Plaintiffs have argued that Defendants' alleged fraud should toll the statute of limitations contained in T.C.A. § 27-9-102. This court, however, sees little difference between this case and any other time-barred action. The court is not persuaded that any fraud was perpetrated in this case. Further, the fraud asserted is not fraud in concealing the cause of action or inducing the Plaintiffs not to exercise their right to appeal. In order for fraudulent concealment to toll the statute of limitations, the alleged fraud must relate to Plaintiffs' right to file the petition, rather than the merits of the Defendants' statements or position before the Board of Zoning Appeals.
>
> . . . .
>
> The stipulations reflect that if Plaintiff Don Shafer saw the sign placed at the site by the Defendant City, as alleged by Plaintiffs, the sign nevertheless placed Don Shafer on notice that more information was available at the City of Dickson Codes Department, including the application for the variance and a site plan depicting all of the property subject to the variance. It is undisputed, and indeed stipulated, that the site plan depicting all of the property subject to the variance has been available for public inspection in the City of Dickson Codes Department at all times since the application for the variance was filed on May 1, 2000.

The Shafers appeal arguing that: (1) due process requires the Board or an applicant for a variance to provide notice of a hearing to an adjoining landowner whose rights would be affected; (2) Tenn. Code Ann. § 27-9-102 does not bar an adjoining landowner from appealing a decision of the Board more than sixty (60) days after the final hearing when there was no actual or accurate notice of the hearing and the decision of the Board was based on fraudulent information; and (3) the Board amended the prior grant of the variance by reconsidering the matter at the September 19, 2000 meeting, which effectively extended the time limitation of Tenn. Code Ann. § 27-9-102.

II. Statute of Limitations

A. The Applicable Time Period

As a threshold issue, we must determine if the trial court correctly dismissed the Shafers' petition for common-law writ of certiorari for lack of subject matter jurisdiction because it was filed

some 128 days after the Board's decision to grant the setback variance. The trial court concluded that the failure of the Shafers to file their petition for common-law writ of certiorari within sixty (60) days of the Board's May 16, 2000, hearing deprived the court of subject matter jurisdiction to review the Board's decision granting the variance.

The Tennessee Supreme Court has determined that the common-law writ of certiorari is the appropriate procedure to review an administrative zoning decision of a board of zoning appeals. *McCallen v. City of Memphis*, 786 S.W.2d 633, 639 (Tenn. 1990); *Fallin v. Knox County Bd. of Comm'rs*, 656 S.W.2d 338, 342 (Tenn. 1983).

Tenn. Code Ann. § 27-9-102 provides that a party aggrieved by an order or judgment of a board or commission may have the order or judgment reviewed by the courts by filing a petition for writ of certiorari in the Chancery Court "within sixty (60) days from the entry of the order or judgment." The sixty (60) day time limitation for filing a petition for writ of certiorari is mandatory and jurisdictional. *Thandiwe v. Traughber*, 909 S.W.2d 802, 804 (Tenn. Ct. App. 1995). In *Thandiwe*, this court stated:

> A petition for certiorari must be filed within sixty (60) days from and after the entry of the order or judgment of the Board decision complained of, in order to seek review. Tenn. Code Ann. § 27-9-102. . . .
>
> The time limits apply to both the common-law and statutory writs of certiorari. *Fairhaven Corp.*, 566 S.W.2d at 886. The failure to file within the statutory time limits results in the Board's decision becoming final, and once the decision has become final, the Chancery Court is deprived of jurisdiction. *Wheeler v. City of Memphis*, 685 S.W.2d 4, 6 (Tenn. Ct. App. 1984); *Fairhaven Corp.*, 566 S.W.2d at 887.
>
> The time requirement for filing a petition of certiorari is analogous to the requirements of the Tennessee Rule of Appellate Procedure 4. Our courts have held, relying in part on *United States v. Robinson*, 361 U.S. 220, 80 S. Ct. 282, 4 L. Ed. 2d 259 (1960), that the rule is mandatory and jurisdictional. *See, e.g., State v. Williams*, 603 S.W.2d 157, 158 (Tenn. Crim. App. 1980); *John Barb, Inc. v. Underwriters at Lloyds of London*, 653 S.W.2d 422, 424 (Tenn. Ct. App. 1983). . . .

Id. at 805-05.

The "time for filing a common-law writ of certiorari is measured from the date of the entry of the order for which judicial review is sought." *Brannon v. County of Shelby*, 900 S.W.2d 30, 33-34 (Tenn. Ct. App. 1994); *Residents Against Indus. Landfill Expansion, Inc. v. Tennessee Dep't of Env't and Conservation*, No. 01A01-9507-CH-00311, 1998 Tenn. App. LEXIS 125, at *10 (Tenn. Ct. App. Feb. 20, 1998) (no Tenn. R. App. P. 11 application filed). The Board herein granted the variance on May 16; the Shafers consistently alleged it was granted at that time; the Director of

Planning and Zoning stated a variance was effective when granted by the Board; and the stipulated facts reflect the Board approved the variance on May 16.[5] The sixty (60) day time period for seeking review of the Board's decision began running on May 16. The filing on September 21 was obviously untimely.

B. Reconsideration of the Variance by the Board

In the case herein, the petition filed by the Shafers alleged that "on May 16, 2000, the [Board] approved the variance requested by [Premier/Welton]." However, on appeal, the Shafers allege that the Board's decision on the variance was not final until the September 19, 2000, meeting where the Shafers asked the Board to reconsider the grant of the variance. The Shafers argue that the minutes of the Board reflect that the Board heard additional evidence from Premier regarding the survey and also reflect deliberation on the issue in addition to a vote by the Board determining that the grant of the variance was proper under the circumstances. Consequently, they assert, such action taken by the Board in September showed that the May 16 decision was not final, and that the statute of limitations should run from the September meeting.

The minutes from the September Board meeting show some discussion of the request for reconsideration, as reflected in the exposition of the facts set out earlier in this opinion. As for as official action taken, the minutes reflect that a board member moved to let the variance stand as granted. This motion was adopted by the Board. In effect, the actions of the Board on September 19, 2000, constituted a denial of the request to reconsider. We find nothing in the minutes to indicate the Board actually reconsidered the variance. To the contrary, the Board gave Mr. Shafer the opportunity to explain why he thought the Board should reconsider the variance and gave other interested parties as well as the Director of Zoning the opportunity to speak. We conclude the Board did not reconsider, or attempt to reconsider, the previously granted variance.[6]

Consequently, because the decision of the Board became final when no petition for common-law writ of certiorari was filed within sixty (60) days of the grant of the variance on May 16, 2000, and the Shafers failed to comply with the mandatory, jurisdictional prerequisites for judicial review of the Board's decision to grant the variance, the Chancery Court lacked subject matter jurisdiction and correctly dismissed the petition.

---

[5] In *Advanced Sales, Inc. v. Wilson County Bd. of Zoning App.*, No. 01-A-01-9805-CH-00245, 1999 Tenn. App. LEXIS 333 (Tenn. Ct. App. May 28, 1999) (no Tenn. R. App. P. 11 application filed), this court held that a board's decision (in that case denying an application for a zoning variance) was entered on the date of the Board's action, not when the minutes of that meeting were later approved. The Shafers do not argue the variance was effective only after the June approval of the May 16 minutes. Their September 21 filing was more than 60 days after that event also.

[6] Because the Board's decision granting the variance became final in July, it is questionable that the Board had authority or jurisdiction to reconsider its final decision after that date in the circumstances presented here.

III. Tolling of the Statute of Limitations

Alternatively, the Shafers argue that even if the mandatory, jurisdictional time limitation of Tenn. Code Ann. § 27-9-102 began to run on May 16, 2000, it should have been tolled because of the "fraudulent" survey submitted by Premier to the Board and their own lack of actual notice as to the proposed variance request. A review of the record, however, establishes that the Shafers were given adequate notice of the hearing on the variance and that no fraud or lack of notice exists that would toll the statute of limitations.

A. Notice

Tenn. Code Ann. §§ 13-7-201 to -211 contains the enabling statutes which authorize municipalities to establish boards to hear zoning issues. The statutes do not set forth any specific requirements regarding notice of hearings. Tenn. Code Ann. § 13-7-205(3)(b) actually empowers a board with the authority to develop such rules as necessary for carrying out its duties. There is no ordinance in place which requires the City herein to place a sign signifying notice of a hearing and no procedure that requires applicants for variances to provide actual notice of a proposed variance to adjoining landowners.

In the case herein, the City placed a sign on the property owned by Welton. At the September hearing before the Board, Mr. Shafer argued that although he had seen the sign notifying the public of the variance request and the date of the hearing, the sign was placed on the lot where the existing store was located, not on the adjacent vacant lot and, therefore, he had no notice that the variance would affect the unimproved lot.

It is undisputed that Welton owns both lots, which are adjacent to each other but were acquired at different times by recorded deed. It is also undisputed that the site plan included both lots and showed construction of the market on the then-unimproved lot. The parties herein stipulated that it "is not unusual for an applicant for a variance to submit one site plan containing one legal description even though the lots comprising the parcel at issue have not been legally combined through the recording of one deed."

This acknowledged practice is consistent with Article III, Section 10 of the zoning ordinances of the City of Dickson, which defines a "lot" as:

> A piece or parcel or plot of land in one ownership which may include one or more lots or [sic] record, occupied or to be occupied by one or more principal structures and accessory structures including the open spaces required under the ordinance.

A landowner is charged with knowledge of city ordinances. *Union Trust Co. v. Williamson County Bd. of Zoning App.*, 500 S.W.2d 608, 617 (Tenn. 1973) (citing *City of Knoxville v. Hargis*, 184 Tenn. 262, 271, 198 S.W.2d 555, 559 (1947)).

In addition to imputed knowledge of the ordinance allowing combination of separate lots of record, Mr. Shafer had actual knowledge of the practice. Mr. Shafer himself had requested a setback variance in 1995 for a parcel adjacent to the Par Mart property that was comprised of two uncombined lots of record with one address.[7]

We agree with the trial court's conclusion that the Shafers had adequate notice of the variance request because they saw the sign on the Welton property and because the site plan showing the proposed construction and setback variance was on file and subject to public inspection.

B. The Alleged "Fraud"

The Shafers argue that the Board's May 16, 2000, decision was based upon fraud because the Board made the decision to grant the variance based upon a site plan or survey filed by Premier which depicted the lot as being smaller than it actually was and that the "fraudulent" site plan or survey should toll the statute of limitations. In addition, the Shafers argue that the placement of the notice sign on the improved lot only amounted to a fraud that should have tolled the statute of limitations due to the fact that the variance sought would apply to both the improved lot and unimproved lot.

In order for fraud to toll the statute of limitations in the case herein, the site plan or survey must have affected the Shafers' right to file their petition rather than the merits of Premier's statements or position before the Board. *See Fahrner v. SW Mfg., Inc.*, 48 S.W.3d 141 (Tenn. 2001) (explaining that proof that actions of the defendant prevented the plaintiff from discovering the facts necessary to file his complaint would toll the running of the statute of limitations for the length of time that the defendant misled the plaintiff via the doctrine of equitable estoppel); *Soldano v. Owens-Corning Fiberglass Corp.*, 696 S.W.2d 887 (Tenn. 1985) (stating that fraudulent concealment tolls the statute of limitations when the plaintiff proves that "the defendant took affirmative action to conceal his [plaintiff's] cause of action and that he, the plaintiff, could not have discovered his cause of action despite exercising reasonable diligence").

The Shafers alleged fraud in that the site plan or survey depicted the Par Mart property as being smaller than it actually was.[8] However, the error in the survey was not related to the Shafers' right to file the petition or notice of the hearing. The Shafers have not alleged that the inaccurate site plan or survey prevented them from opposing the variance or seeking judicial review in a timely

[7]Mr. Shafer requested a setback variance for a parcel of property adjacent and to the west of the parcel on which his Storage Building rests, which is occupied by Mary's Music, a business operated by Shafer's wife. The Storage Building is directly adjacent to the unimproved lot in question in the case herein. Mary's Music rests upon two separate lots which together comprise the parcel which was the subject of the variance request in 1995. The Shafers placed only one address on the application for the variance, and no sign was placed on the parcel to advise the public of the application for the variance prior to the Board's approval of the variance.

[8]The Board herein granted the variance on the basis of the slope of the lot rather than the size. The decision of the Board, therefore, was not based on the inaccurate information in the site plan.

manner. There are no allegations or proof in the record that Welton, Premier, or the city in any way concealed the fact that the variance had been granted and thereby prevented the Shafers from discovering their cause of action against the Board.

With regard to the allegations that notice of the variance request was inadequate and that the placement of the notifying sign should toll the statute of limitations, we have already determined that the notice was adequate. In addition, a similar issue was addressed in *Kielbasa v. Wilson County Bd. of Zoning App.*, No. M1999-01155-COA-R3-CV, 2000 Tenn. App. LEXIS 277 (Tenn. Ct. App. May 5, 2000) (no Tenn. R. App. P. 11 application filed). In *Kielbasa*, Mr. and Mrs. Kielbasa owned a parcel of land adjacent to a parcel of land owned by B & H Rentals. B & H applied for a building permit to construct a concrete plant and the permit was approved on July 25, 1997. The Kielbasas filed their petition for common-law writ of certiorari on April 8, 1998, 257 days after the decision of the Board, arguing that the statute of limitations should be tolled because the Board did not comply with its own notice provisions and, alternatively, that the meeting was fraudulently concealed by the Board. The trial court found that the notice of the hearing was appropriately published in a newspaper of general circulation, complying with the Board rules in an adequate and timely fashion, and dismissed the petition. This court affirmed the trial court's decision, stating:

> The Board was required under its rules to publish a notice of the time and place of the meeting in a daily paper of general circulation in Wilson County, and the notice which was published cited the time and place of the Board's meeting and then gave a list of requests which would be presented, including 'Priscilla Hand, use located on Beckwith Road/I40.' The Board met on April 25th and approved Ms. Hand's request. The Minutes reflect that two adjoining property owners appeared in opposition to the request, and the record further shows that B & H applied for a building permit for the plant on October 16, 1997, which was granted.
>
> . . . .
>
> Petitioners argue the Board fraudulently concealed its meeting and/or decision from petitioners by not sending them a mailed notice, as was done for other adjoining landowners. . . . As already stated, the Board had no duty in this case to mail notices to any adjoining landowners, including petitioners, thus there is no basis to find fraudulent concealment.
>
> It is unfortunate for the petitioners that they did not have actual notice of the Board of Zoning Appeals' meeting. However, the Board discharged its obligations under the statute. The Constitution does not afford interested landowners a right to actual notice in zoning matters. *See Nichols v. Tullahoma Open Door, Inc.*, 640 S.W.2d 13 (Tenn. Ct. App. 1982).

Kielbasa, 2000 Tenn. App. LEXIS 277, at *4-*6.

We find absolutely nothing in the record before us to indicate the Board, Premier, or Welton attempted to conceal the variance request, their meeting where it was considered, or the fact it had been granted. To the contrary, the Board provided notice and made the site plan available for inspection.

The time limitation in Tenn. Code Ann. § 27-9-102 is mandatory and jurisdictional and was not tolled by the Shafers' unfounded allegations of fraud and lack of notice. They have presented no evidence to the trial court or this court that would justify tolling the statute of limitations. The trial court was correct in its rulings.

IV. Conclusion

The judgment of the Chancery Court dismissing the petition for common-law writ of certiorari is hereby affirmed. The costs of the appeal are taxed to Don and Mary Shafer, for which execution may issue if necessary.

_____

PATRICIA J. COTTRELL, JUDGE